

Transfer of estate management

M v Protective Commissioner [2002] NSWSC 421, Windeyer J

The NSW Supreme Court has granted an application by the mother, M, of a protected person, P, for orders removing the Office of the Protective Commissioner as manager of P's estate and appointing National Australia Trustees Limited.

The Facts

P sustained a severe head injury in a 1996 accident aged 18. In 1999 a settlement of \$2 million was court-approved and a social security preclusion period set until 2042. The Office of the Protective Commissioner (OPC) was appointed to manage P's estate.

M was P's primary carer, with professional assistance. M became frustrated with continual OPC staff changes and lack of communication. After P told her that he was advised that his money would run out, M applied for the removal of OPC and the appointment of National Australia Trustees. M alleged that OPC was reactive and then slow to react to management problems and investment issues and that OPC had failed to invest the fund so that it would last as long as possible in light of the lengthy preclusion period.

M argued that National Australia Trustees should be appointed because it would accept the burdens and duties owed by trustee companies; it offered individualised financial case management and planning and addressed expenditure and budgeting; and it was

a specialist in financial planning and capital preservation with the wide resources of affiliated companies.

Management of P's Estate

After considering OPC's current management, Windeyer J compared OPC and National Australia Trustee's investment plans, as "financial management is an important issue". Features considered included estimated returns, proposed investments, strategies to preserve real capital and income, taxation considerations, expenditure levels, communication proposals, procedures for review and anticipated fees.

Responding to submissions concerning the absence of capital growth and failure to minimise tax, Windeyer J noted:

"(T)he Protective Commissioner is not to be blamed for the size of the fund nor for the outgoings if these are required nor for the preclusion period. It is the task of the manager to manage the funds as efficiently as possible. It is not the task of the manager to create something out of nothing."

Relevant Principles

After noting that the "(o)rdinary management of trust funds is more simple than management of estates of protected persons", Windeyer J held that in applications for change of manager "(t)he court is concerned to act in the best interests of the protected person. Such interests can include feelings of comfort as well as financial interests."

He cited *MB v Protective Commissioner*¹ which held that OPC could be removed without material breach of duty where the relationship with the primary carer had broken down. However, he said:

"It is not my intention to decide that an order for a change of managers is justified by annoyance or minor complaint or even a justified complaint. Such matters are often able to be dealt with by the court giving directions under s12 of the Act."

The Decision

Windeyer J held that there was no breach of duty by OPC. He noted that a change of manager involves disruption and expense and that National Australia Trustees had less experience dealing with protected persons.

However, taking into account the lengthy preclusion period, and as the predictions favoured National Australia Trustees's plan, an order appointing National Australia Trustees was made, with costs being borne by the estate. Factors relevant to this decision were the lack of continuity of OPC managers and associated distress (which was less likely to occur with National Australia Trustees); OPC's indecision as to the implementation of P's investment plan; and the uncertainty of OPC's fees.

Comment

Those seeking to discharge a manager of the estate of a protected person and substitute another will bear a heavy onus due to the disruption and expense involved. However, where it is established that the best interests (financial and non-financial) of the protected person warrant a change of manager, an order will be made. Practitioners should also keep an open mind as to whether it is appropriate to have a private trustee appointed *ab initio*. **PL**

Footnote:

¹ [2000] 50 NSWLR 24.

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